

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

77-4072

To be argued by
THOMAS H. BELOTE

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4072

ANASTASIOS KATRIS, a/k/a STASH KATRES,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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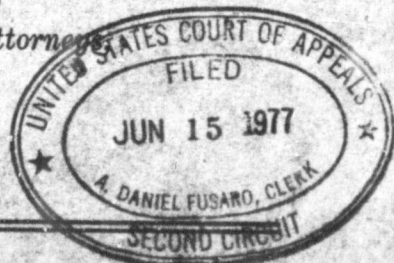


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4072

ANASTASIOS KATRIS, a/k/a "Stash Katres",
Petitioner,
—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Anastasios Katris (the "petitioner", "Katris", the "alien") petitions this Court to review a final order of deportation entered by the Board of Immigration Appeals (the "Board") on January 28, 1977. That order dismissed the alien's appeal from the order and decision of Immigration Judge Francis J. Lyons wherein Judge Lyons found Katris deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1) because Katris had entered the United States without a valid unexpired entry document.

As in the civil administrative proceedings below the alien alleges that his initial arrest, search and/or seizure by the Immigration and Naturalization Service

(the "Service") allegedly violated his rights under the Fourth Amendment of the United States Constitution and, therefore, it is argued, the evidence underlying the finding of his deportability must be suppressed under the theory that it constituted "the fruit of the poisonous tree." As in the deportation proceedings below the alien seeks to have any deportation proceeding terminated on the theory that a claimed Fourth Amendment violation occurred when the alien's illegal presence first became known to the Service. Since the filing of this petition for review Katris has enjoyed the automatic statutory stay of deportation provided by Section 106(a) of the Act, 8 U.S.C. § 1105a(a).

Issue Presented

Was the alien given a fair and impartial hearing in the deportation proceedings below.

Statement of Facts

Introduction: Anastasios Katris, a/k/a Stash Katres, is a native and citizen of Greece who entered this country by illegally crossing the border near Buffalo, New York (AR at 29).¹ Katris entered the country through the aid of an unidentified Greek and in the company of two other illegal aliens from Greece (AR at 30). Katris intended to remain in the United States for an indefinite period of time and has never possessed a valid immigrant visa or other entry document for permanent residence.

¹ References preceded by the letters "AR" are to the pages of the Certified Administrative Record previously filed with the Court.

The alien settled initially in Illinois (AR at 30) and was employed as a restaurant worker (AR at 31). Sometime during the summer of 1975, the alien travelled to New York City and again secured employment as a restaurant worker (AR at 31). The alien was employed in James restaurant on 56th Street in New York City. (AR at 28). In October of 1975, Katris was arrested in a restaurant by officers of the Immigration and Naturalization Service (AR at 21). The restaurant was located on West 56th Street (AR at 25). Katris was released from custody under bond of \$1000.00. He demanded an immediate hearing which was scheduled for October 23, 1975 (AR at 35-36)

The Order to Show Cause and Notice of Hearing, dated October 24, 1975, charged that Katris was not a citizen of the United States but rather a native and citizen of Greece who entered the United States without the necessary entry documents as required by Section 212(a)(26) of the Act, 8 U.S.C. § 1182(a)(20). The order further charged that Katris was therefore subject to deportation under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1).

The Administrative Hearing: On November 7, 1975, Katris appeared at his deportation hearing accompanied by privately retained counsel (AR at 23). The Service provided an official interpreter for the hearing. The hearing progressed as follows.

Katris admitted that his true name was "Anastasios Katris" as charged in the Order to Show Cause and conceded the service and waived the reading of the same (AR at 24). The alien was asked if he conceded the factual allegations of the Order. At this time, his attorney raised an objection to the "admissibility of the allegations in the Order to Show Cause. . . ." (AR at 24).

Katris' attorney stated he served a notice on the Service in connection with his admissibility objection. *Id.* The notice referred to is in the form of a motion and/or affidavit and is located at AR 37-38. The "notice" is attested to by the alien. The "notice" was sworn to on November 7, 1975—the very date of the hearing. Subject to the objection, counsel for Katris conceded the truth of the factual allegations in the Order to Show Cause.²

Katris' attorney then proceeded to make an offer of proof concerning the circumstances of Katris' apprehension. In sum, it was claimed that three Service officers entered a restaurant on West 56th Street and, after obtaining permission from the owner of the restaurant, proceeded to question employees concerning their immigration status. The owner of the restaurant as well as all the employees "in the back" were questioned. (AR at 25) All were aliens and all had green cards³ (AR

² The conceded allegations contained in the Order to Show Cause were:

Upon inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Greece and a citizen of Greece;
3. You entered the United States at Buffalo, N.Y. on or about 9/25/71;
4. It was then your intention to remain indefinitely in the United States;
5. You were not in possession of a valid immigrant visa or other entry document for permanent residence.

³ Counsel's reference to a "green card" is apparently a reference to an alien registration receipt card (Service Form I-151) which is issued to aliens who have been admitted for residence in the United States and which bears a photograph and certain biographical information relating to the alien. Parenthetically, the "green card", as it is referred to in the vernacular, is a blue hue.

at 25). Counsel further stated that during this field investigation Katris was questioned and asked to produce his green card. Katris is alleged to have responded that he was "on vacation here" and then presented an Illinois drivers license. *Id.* On the basis of these unsworn statements Katris' counsel contended that Katris "could have been customer" who was "merely walking into the restaurant to have some . . . or whatever else".⁴ In light of these representations Katris contended that information obtained subsequent to the alien's apprehension should be suppressed, including the admission made at the deportation hearing, and that the deportation proceedings should be terminated.

The "notice" was marked in evidence at the conclusion of counsel's presentation (AR at 27). The "notice" reads in part:

On the date in question, the undersigned avers that he was seized and arrested by Immigration officers while in and about a restaurant premises and with no probable cause. The Immigration officers failed to elicit sufficient information concerning any illegal status of the respondent in the

⁴ Curiously Katris was careful not to make a sworn statement that he was in fact merely a customer in this restaurant on West 56th Street. It is apparently merely a coincidence that Katris testified later in the hearing that he was employed by James Restaurant on 56th Street. (AR at 28). Furthermore, the petitioner on page 6 of his brief states that when the alien was apprehended by Service officials "he was at work. . ."

In Petitioner's Brief, the sequence of events, again as recited by counsel, are somewhat different. Rather than Katris walking into the restaurant after officers had commenced their field investigation, Petitioner's Brief states: "He was merely going about his business when the agents came into the restaurant and began to interrogate him without any sufficient foundation. . . ." Petitioner's Brief at 11.

United States prior to arresting or seizing him. The undersigned will move to suppress all the information resulting from the said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned any Miranda warnings as required by the United States Supreme Court. (AR 37-38).

The above is as "detailed" as the alien chose to commit himself to under oath.

At the conclusion of counsel's argument Judge Lyons denied the alien's motion to suppress and inquired if Katris sought any form of discretionary relief. The alien's counsel requested that Katris be granted the discretionary privilege of voluntary departure under Section 244(e) of the Act, 8 U.S.C. § 1254(e), in lieu of enforced deportation. Thereafter, Judge Lyons questioned Katris as to whether his situation warranted the grant of voluntary departure. Katris replied that he would need three months to depart the country because, as he stated: "I would like to get some money to take along." (AR at 34).

At the conclusion of the hearing the Immigration Judge rendered his decision reciting the alien's admissions relating to alienage and the essential facts establishing his deportability. Judge Lyons found that Katris was deportable as charged. Judge Lyons found that the offer of proof established nothing more than voluntary interrogation of a number of aliens. Judge Lyons further found that the offer of proof was irrelevant because the respondent's admissions during the course of the deportation hearing alone were sufficient to support the finding of deportability.

Judge Lyons denied the discretionary application for voluntary departure finding that the alien's testimony

concerning his surreptitious entry into the country and his inability to testify about those persons who assisted in this smuggling operation was a contrived and false story. The administrative judge found that Katris' manner of entry, and his immediate employment in the United States constituted a willful and deliberate violation of the immigration laws which should not be condoned. Judge Lyons noted that to grant voluntary departure in light of Katris' representation that it would take three months to effect his departure would be nothing short of a condonation of his previous misconduct.

On November 14, 1975, Katris appealed Judge Lyons' decision to the Board of Immigration Appeals claiming that (1) the Immigration Judge erred on failing to permit the alien to testify as to the facts surrounding his apprehension despite the claim that the alien was arrested without probable cause and the offer of proof made at the hearing; (2) the Immigration Judge erred in declining to subpoena material witnesses at the hearing;⁵ and (3) the Immigration Judge failed to base his determination on legally admissible evidence (AR p. 5).

On January 28, 1977, the Board rendered its decision on the alien's application to terminate the deportation proceedings and dismissed the appeal (AR at 2-4). On February 14, 1977, the District Director of the New York Service District Office issued a Warrant of Deportation against Katris, and the alien was notified to surrender for deportation to Greece. On March 21, 1977, Katris filed this petition for review.

⁵ A request for the issuance of subpoenas was presented to Judge Lyons during the course of the hearing. The request is included in the so-called "notice".

ARGUMENT

POINT I

The Nature Of The Petitioner's Arrest Does Not Effect The Validity Of The Deportation Proceeding.

This petition for review centers on one contention. Katris claims that his apprehension was illegal and, therefore, the Service should be prohibited from pursuing him unless the agency can establish a new and independent basis for his apprehension. In short, Katris demands that the Government ignore his admitted illegal presence and let him back into the mainstream of life with a guarantee of anonymity. This position is simply untenable.

During the deportation hearing Katris, through his attorney, conceded that:

(1) he was born in Greece and was a citizen of that country;

(2) he was not a citizen of the United States;

(3) he entered the United States illegally across the international border near Buffalo, New York with the intention of remaining indefinitely in this country;

(4) he was not inspected or admitted as required by law nor was he in possession of necessary entry documents.⁶

Furthermore, Katris testimony during the latter part of the deportation hearing (AR at 28-34) clearly established the validity of the finding that this alien is deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251 (a) (1).

⁶ See footnote 2. *supra*.

This Court's decision in *Avila-Gallegos v. Immigration and Naturalization Service*, 525 F.2d 666 (2d Cir. 1975), is four-square authority that this petition for review must be denied.⁷ In *Avila-Gallegos* the alien contended that his arrest was illegal because it was without a warrant or probable cause and that he failed to receive proper *Miranda* warnings. Arguing from that premise the alien concluded that all his testimony should have been suppressed and the case against him dismissed.

This Court neither agreed with the premise nor the conclusion. In addition to rejecting the alien's arguments on probable cause and the necessity of *Miranda* warnings the Court went on to say that even if the arrest had been technically defective it did not follow that the deportation proceedings were thereby rendered null and void. As Judge Van Graafeiland stated at 667:

Regardless of the legality of his arrest, since the petitioner's deportation hearing testimony, standing alone was sufficient to support the order of deportation, his petition for reversal of such order and dismissal and termination of the deportation proceedings should be denied [Citations omitted.]

⁷ Despite petitioner's failure to address *Avila-Gallegos* in his brief we note that his counsel should be quite familiar with that case and the issues presented since counsel's firm represented that alien raised the identical arguments as presented in this petition. Further, counsel himself represented the alien in *Alvarado-Santos v. Immigration and Naturalization Service*, Docket No. 76-4250 (2d Cir.) (petition denied from the bench pursuant to § 0.23 of the Rules of the United States Court of Appeals for the Second Circuit) and raised the identical arguments presented in this case. In both *Avila-Gallegos* and *Alvarado-Santos* the aliens challenged their initial apprehensions and sought to terminate the deportation proceedings despite the fact they admitted alienage and deportability over the blanket objections of counsel. See Respondents' Briefs in those cases, Docket Nos. 74-2647 and 76-4250.

See also *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *La Franca v. Immigration and Naturalization Service*, 413 F.2d 686 (2d Cir. 1969); *Guzman-Flores v. Immigration and Naturalization Service*, 496 F.2d 1245, 1248 (7th Cir. 1974); *Huerta-Cabrera v. Immigration and Naturalization Service*, 466 F.2d 759 (7th Cir. 1972); *Vlissidis v. Anadell*, 262 F.2d 389 (7th Cir. 1959); *Klissas v. Immigration and Naturalization Service*, 361 F.2d 529 (D.C. Cir. 1966).

If the rule were otherwise, aliens in the petitioner's position could permanently immunize themselves from deportation by showing that their initial apprehension by an immigration officer was defective. No such absurd result is required or contemplated by the Act or the Constitution. Since the finding of deportability in this matter was based solely upon Katris' concessions during the deportation hearing, his argument relating to the alleged illegality of his arrest or any admissions made to the apprehending Service officers at the time of his arrest is clearly irrelevant to the proceeding below and the validity of the order of deportation."

"To the extent that Katris' argument relates to any admissions made by him at the time of his apprehension it is repeated that no such evidence was introduced at the deportation hearing. The alien's notice of motion (AR at 37-38) was clearly directed at pre-hearing admissions which were never received in evidence. Therefore, despite petitioner's contentions, there was no evidence before the Immigration Judge to suppress at anytime during the hearing. In addition, in his motion Katris moved "to suppress all the information resulting from said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court" (AR at 38). To the extent that petitioner's arguments in the administrative proceedings below, or to this Court on review, are based on the Fifth Amendment protections discussed in *Miranda v. Arizona*, 384 U.S. 436 (1966), we note that this argument has been rejected by this

[Footnote continued on following page]

Furthermore, even if Katris had not admitted his alienage and deportability during the hearing his silence would not have saved him from the proper operation of Section 242 of the Act, 8 U.S.C. § 1252. Pursuant to its plenary powers over immigration related matters Congress specifically empowered Immigration Judges with the authority to take sworn testimony and examine the subject of a deportation proceeding regarding alienage and deportability. See *Bilokumsky v. Tod*, *supra* at 155; *Medeiros v. Brownell*, 240 F.2d 634 (D.C. Cir. 1957) (alien's admission of alienage and deportability over objection of his counsel held sufficient to establish deportability); *Matter of Laqui*, 13 I & N Dec. 232, *affirmed on review*, *Laqui v. INS*, 422 F.2d 807 (7th Cir. 1970). Despite a blanket objection by counsel during a deportation hearing as to admissibility of an alien's testimony, these proceedings are not regarded as criminal proceedings and as such are not subject to the constitutional restrictions of criminal trials. *Abel v. United States*, 362 U.S. 217, 237 (1960). While an alien is entitled to due process in a deportation proceeding, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), he has no constitutional right to remain mute or object to examination by an Immigration Judge during a hearing on the issue of his alienage or right to be or remain in the United States.⁹ Indeed, an alien's silence may be deemed tantamount to an admission of the facts. *Vajtauer v. Commissioner*, 273 U.S. 103 (1927);

Court. *Avila-Gallegos*, *supra*, at 667; see also *Chavez-Raya v. INS*, 519 F.2d 397 (7th Cir. 1975); *Nason v. INS*, 370 F.2d 865 (2d Cir. 1967). We also note that there has never been a scintilla of evidence proffered in this case to support the charge that some form of duress occasioned Katris' apprehension.

⁹ In fact Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of the alien to show the time, place, and manner of entry into the United States. Furthermore, the failure to sustain that burden of proof creates a presumption that the person is in the United States in violation of law.

Bilokumsky v. Tod, *supra*. Moreover, it would not be error for the Government to direct an alien to testify in order to establish its case, *Loufakis v. United States*, 81 F.2d 966 (3d Cir. 1936); *Laqui v. INS*, *supra* (9th Cir. 1969), and the consideration of such testimony by an Immigration Judge would be proper.¹⁰

POINT II

Petitioner Failed To Make A Proper Showing That An Evidentiary Hearing Was Warranted During The Administrative Proceedings.

Although this Court's decision in *Avila-Gallegos*, is dispositive, alternative grounds as discussed in Judge Lyons and the Board's decision exist which mandate the denial of Katris' petition. Even if evidence other than the alier's own admissions at the deportation hearing had been received in evidence, Katris' motion for an evidentiary hearing on the circumstances surrounding his arrest would have no merit. As the Board noted in *Matter of Tang*, 13 I & N Dec. 691, the party raising an objection to the admissibility of evidence must come forward with proof establishing a *prima facie* case in support of that contention before the Service should be called upon to assume the burden of justifying the manner in which it obtained its evidence. Citing *United States v. Garcia*, 272 F. Supp. 286 (S.D.N.Y. 1967) the Board stated:

¹⁰ Katris objections in this case have been based upon Fourth Amendment claims and at no time did he invoke the Fifth Amendment privilege against self incrimination. Therefore we need not address ourselves fully on that issue as it relates to a deportation hearing. *But see Au Yi Lau v. INS*, Docket No. 76-1048 (D.C. Cir., decided April 28, 1977); *Vlisidis v. Holland*, 245 F.2d 812 (3d Cir. 1957). *See also Baxter v. Palmigiano*, 425 U.S. 309 (1975); *California v. Byers*, 402 U.S. 424 (1971).

"The reason for our rule—one similar to that which prevails in criminal matters—is well stated in *Garcia, supra*. There the Court said:

' . . . Experience shows that unless such serious charges are initiated upon the sworn statement of persons having personal knowledge of the facts, a great deal of time of the parties and the Court is frequently wasted upon unnecessary, expensive and protracted suppression hearings, all for the reason that the attorney demanding suppression merely upon his own say-so often discovers only at the hearing that he has been misled by unsworn representations of his clients, which they would be unwilling to swear to in an affidavit, particularly if they were questioned closely by their counsel and warned of the consequences of perjury.' "

In this case Katris' motion demanding an evidentiary hearing was woefully inadequate containing merely the barest and most conclusory allegation of constitutional violation and did not require an evidentiary hearing on the motion (AR p. 37-38). See pages 5-6, *supra*. *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969). See also *Nardone v. United States*, 308 U.S. 338 (1939); *Grant v. United States*, 282 F.2d 165, 170 (2d Cir. 1960); *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967); *United States v. Casanova*, 213 F. Supp. 654, 657 (S.D.N.Y. 1963) (Weinfeld, J.).

Nor should the unsworn assertions of Katris' counsel during the deportation hearing lend any credence to the conclusory allegation made in the alien's motion.¹¹ As

¹¹ In fact counsel's offer of proof demonstrates the lack of merit in Katris' claim. Those representations reflect that Service officers, after receiving the consent of owner, conducted voluntary

[Footnote continued on following page]

noted by the Board the reasons for this are persuasively set forth in *United States v. Garcia, supra*. As Judge Mansfield stated in *Garcia*, experience shows that unless serious changes are initiated on the sworn statements of persons with personal knowledge of the facts a great deal of time is wasted by the parties and the Court on unnecessary and protracted suppression hearings. Similar reasoning applies to the administrative proceedings below.

We cannot but bring to this Court's attention the fact that Katris' unfounded allegation has gained him a substantial delay which he will now undoubtedly attempt to utilize in an effort to obtain permanent resident status.¹²

questioning of various alien employees in the restaurant. They similarly approached Katris (who apparently, in view of the fact that an interpreter was required at the deportation hearing, does not speak English or is at best not fluent in the language) and requested that he show them his alien registration card. Katris allegedly responded that he was "on vacation here" and presented instead an Illinois drivers license which contained a social security number. Had Katris been "on vacation here" from *Cuba* as an alien tourist, he should not be working nor would he have a social security card. As in *Ojeda-Vinales v. Immigration and Naturalization Service*, 523 F.2d 286 (2d Cir. 1975), this would give probable cause for his arrest. Alternatively, had Katris' statement been made to falsely imply he was a legal resident who was in New York "on vacation" from a residence in Illinois, Service officers were still warranted in arresting the alien. In the latter case an alien's failure to carry the alien registration card would justify the officers' arrest for possible prosecution under 8 U.S.C. § 1304(e).

¹² At his deportation hearing in November, 1975, Katris testified that his sister was a permanent resident alien who had been admitted to the United States three years prior to that hearing. She will very shortly be eligible to apply for naturalization under 8 U.S.C. § 1427 and, in turn, would undoubtedly petition for Katris' admission to the United States as a fifth preference immigrant pursuant to 8 U.S.C. § 1153(a)(5). We also wish to

[Footnote continued on following page]

This petition, as the one in *Avila-Gallegos*, has resulted in a "reprise from deportation." 525 F.2d at 666 n.1. The "reprise", we respectfully suggest, is the reason for this petition.

POINT III

The Judicially Created Exclusionary Rule Should Not Be Extended By This Court To A Purely Civil Administrative Deportation Proceeding.

The petitioner urges this Court to impose the equivalent of the Fourth Amendment exclusionary rule applicable in criminal cases to civil administrative deportation proceedings. Although we submit that this Court's decision in *Avila-Gallegos*, *supra*, is dispositive of the issues raised in this case, we also urge this Court to reject Katris' attempt to expand the applicability of the exclusionary rule to civil administrative deportation proceeding.

call attention to the fact that this is but the most recent of a similar line of petitions for review which have been brought by Katris' counsel's firm wherein identical claims were presented. In each case an administrative appeal and subsequent petition delayed the final execution of the administrative order. See *Alvarado-Santos v. Immigration and Naturalization Service* (2d Cir. Docket No. 76-4250); *Mayen v. Immigration and Naturalization Service* (2d Cir. Docket No. 77-4022); *Tsai Fu Chen v. Immigration and Naturalization Service* (2d Cir. Docket No. 77-4056); *Mendez-Sanchez v. Immigration and Naturalization Service*, (2d Cir. Docket No. 77-4039). We have attached in an Addendum to this brief the "notices" submitted in the above captioned actions. Should this Court agree with the position that these petitions were interposed solely for delay, sanctions are appropriate. See *Overmyer v. Fidelity and Deposit Company of Maryland et al*, Docket No. 76-7566 (2d Cir. decided May 3, 1977) (slip op. at 3287); *Teledyne Industries v. Podell*, 546 F.2d 495 (2d Cir. 1976); *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976).

The Government does not dispute that the Fourth Amendment protects aliens as well as citizens. Nonetheless, it is respectfully submitted that the judicially created exclusionary rule first enunciated in *Weeks v. United States*, 232 U.S. 383 (1913), only precludes the use of evidence obtained in violation of the Fourth Amendment in *criminal* proceedings against the subject of an illegal search and seizure and is inapplicable to deportation proceedings. Deportation proceedings have consistently been held to be *civil* in nature and not the equivalent of criminal prosecutions. *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Papapil v. Immigration and Naturalization Service*, 424 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 908 (1970).

While an alien is entitled to due process and a full and fair hearing in the deportation proceedings, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1949), the full panoply of procedural and substantive safeguards which are provided in a criminal proceeding are not required at a deportation hearing. See *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) (presumption of innocence does not apply in immigration proceedings); *Chen v. Immigration and Naturalization Service*, 537 F.2d 566 (1st Cir. 1976); *Chavez-Raya v. Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975) (failure to give *Miranda* warnings does not render the alien's statements made during custodial interrogation inadmissible in deportation proceedings); *Nason v. Immigration and Naturalization Service*, 370 F.2d 865 (2d Cir. 1967) (no right to counsel at preliminary investigation before immigration investigators); *Bridges v. Wixon*, 144 F.2d 927 (9th Cir.), *rev'd on other grounds*: 326 U.S. 135 (1945) (double jeopardy inapplicable to deportation proceedings); *Matter of Laqui*, 13 I & N Dec. 232 (cases cited therein at 233). See also *Laqui v. Immigra-*

tion and Naturalization Service, 422 F.2d 807 (9th Cir. 1970).

Furthermore, the extension of the application of the exclusionary rule runs counter to the analytical framework adopted by the Supreme Court in *United States v. Calandra*, 414 U.S. 338 (1974), wherein the Court described the exclusionary rule as,

a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. Despite its broad deterrent purposes, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought to be most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use evidence to *incriminate* the victim of the unlawful search. (Citations omitted). This standing rule is premised on a recognition that *the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.* (Emphasis added.)

Id. at 348.

In declining to apply the exclusionary rule to grand jury proceedings the Court noted that the broad dictum of *Silverthorne Lumber Co. v. United States*, 251 U.S.

385 (1920), often relied upon for extending the exclusionary rule, had been substantially undermined by later cases. *Id.* at 352-353 n.8.

The refusal of the Court in *Calandra* to extend the exclusionary rule beyond those limited situations where Government conduct would result in the imposition of a *criminal sanction* and the application of that analysis to a civil deportation proceeding is in accord with Justice Frankfurter's decision in *Abel v. United States*, *supra* at 237:

If anything we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict then we are to protect them from searches for matter bearing on deportability. According to the uniform decisions of this Court deportation proceedings are not subject to the Constitutional safeguards for criminal prosecution. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed. (Emphasis added.)

More recently the Court has again examined the propriety of extending the judicially created exclusionary rule to a federal civil proceeding wherein the evidence had been obtained in an unconstitutional search by state authorities. The Supreme Court refused to extend the rule. *United States v. Janis*, 428 U.S. 433 (1976). While *Janis* involved an attempt to extend the exclusionary rule to an intersovereign situation the Court in declining to further extend the rule noted that it had never applied

the exclusionary rule "to exclude evidence from a civil proceeding, federal or state." *Id.* at 447. Although the consequences of deportation may be severe in individual cases, *Costello v. Immigration and Naturalization Service*, 376 U.S. 120, 128 (1964), the purpose of expulsion by deportation is not to penalize the alien for a criminal offense but rather to administratively regulate the entry of aliens into the United States.¹³ See *Oliver v. United States Department of Justice*, 517 F.2d 426 (2d Cir. 1975); compare *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (forfeiture was clearly a penalty for the criminal offense and was quasi criminal in nature). See *Powell v. Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966) (discharge proceedings analogous to proceedings

¹³ Judicial support for refusing to further extend the exclusionary rule to civil deportation proceedings is also found in the dissenting opinion by Justice Stewart in *Janis* in which he noted that the tax wagering statutes in question operate in an area permeated with *criminal* statutes and impose liability on a group inherently suspect of *criminal* activities. Justice Stewart noted that the tax provisions in *Janis* are intended not merely to raise revenue but also to assist law enforcement authorities in enforcing *criminal penalties* for unlawful wagering activities. It therefore appears that the judicial extension of the exclusionary rule even under the broadest interpretation would at best only be extended to civil proceedings which serve as an adjunct to the *enforcement of criminal penalties*. *Id.* at 460. Cf. *Pizzarello v. United States*, 408 F.2d 570 (2d Cir. 1969); *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio, 1966); *Lassof v. Gray*, 207 F. Supp. 843 (W.D. Kentucky, 1962).

Unlike the wagering provisions in *Janis* the Immigration and Nationality Act is civil and primarily regulatory in nature. See *Matter of Lau*, Interim Decision #2272 decided by the Board on March 19, 1974. The immigration laws do not impose liability on a group inherently suspect of *criminal activities* but rather attempt merely to regulate the immigration of aliens into the United States in accordance with the structured system created by Congress. Compare *California v. Byers*, 402 U.S. 424 (1971) (extension of the Fifth Amendment privilege against self incrimination is unwarranted in the context of an essentially non-criminal and regulatory state statute).

involving the imposition of criminal sanctions); *Tovar v. Jarecki*, 83 F.Supp. 47 (N.D. Ill. 1948), *rev'd on other grounds*, 173 F.2d 449 (7th Cir. 1949) (assessment deemed a penalty rather than merely a tax). Accordingly, the judicial extension of the exclusionary rule to a deportation proceeding especially to the extent demanded by the petitioner is clearly unwarranted in this civil proceeding.¹⁴ *Stone v. Powell*, 428 U.S. 465 (1976), (1976) (concurring opinion of Chief Justice Burger at 5323), and *N.L.R.B. v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969). Compare *Rogers v. United States*, 97 F.2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D.C. Mont. 1920), *appeal dismissed*, 267 Fed. 1022 (9th Cir. 1920).

The alien demands this expansive coverage in a case where the Government is not seeking a criminal conviction. The sole purpose of the deportation proceeding is to effect the removal of an alien illegally residing in the United States until such time as that alien is able to obtain legal admission as an immigrant. It is submitted that the concurring opinion of Chief Justice Burger in *Stone v. Powell*, *supra* at 499, is noteworthy in regard to Katris' argument:

Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge created device based on "hard cases," serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able

¹⁴ Prior to the Court's decision in *Janis* various Courts of Appeals have rejected extending the exclusionary rule, e.g., *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States v. Schipani*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *Ekelund v. Secretary of Commerce*, 418 F. Supp. 102, 106 (U.S.D.C., E.D.N.Y. 1976). *aff'd*. Docket No. 76-6155 (2d Cir May 23, 1977):

to demonstrate that the rule does in fact have any deterrent effect. In the face of dwindling support for the rule some would go so far as to extend it to *civil* cases. *United States v. Janis, supra*.

To vindicate the continued existence of this judge made rule, it is incumbent upon those who seek its retention—and surely its extension—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law.

Contrary to Katris' contentions, the exclusionary rule is not a personal right,¹⁵ but a judicially created remedy which is "grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, Search, Seizure and Section 2255: A Comment, 112 U.Pa. L. Rev. 378, 389 (1964).

It is respectfully submitted that an expansion of the exclusionary rule will only serve the illegal alien's desire to delay his deportation and to continue illegal employment in the United States. A suppression hearing would merely enable many if not all illegal and deportable aliens to further delay their proper expulsion from the United States. See *Avila-Gallegos, supra* at 66 n.1. The exclusionary rule would merely encourage aliens charged with deportability to stand mute at their hearings after alleging an illegal arrest causing the taxpayers, through the Service, to call agency personnel and other persons to testify at deportation hearings in order to establish deportability.¹⁶ Further under the

¹⁵ *United States v. Calandra, supra* at 348.

¹⁶ See *Matter of Laqui*, 13 I & N Dec. 232, 235:

"Effective enforcement of the immigration laws requires that the true facts be established with a minimum of de-

[Footnote continued on following page]

petitioner's application of the exclusionary rule in any case where a Fourth Amendment violation did occur the Government, despite its plenary power over immigration, see *Kleindienst v. Mandel*, 408 U.S. 753 (1972), could well be precluded from obtaining the removal of even the most antisocial or dangerous alien who entered the United States illegally. If the extension proposed by *Katris* were accepted, aliens could permanently immunize themselves from deportation by showing their initial apprehension by an immigration officer was defective.

The Supreme Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), relied upon by the petitioner, does not support the extension of this rule as demanded by the alien petitioner. *Brignoni-Ponce* did not relate to on-the-street questioning by Service officers. *Id.* at 884 n.9. To the contrary, although the Court applied the exclusionary rule to the driver of the automobile who was charged with two criminal counts under 8 U.S.C. § 1324, nothing in the Court's opinion remotely suggests that the application of the exclusionary rule would also be applied to the illegal alien—passengers during a subsequent civil deportation hearing. In view of the potential for delay if applied to the administrative deportation proceedings, the vast number of aliens who could frustrate the enforcement of the immigration laws by invoking the exclusionary rule merely for delay, and the availability of alternative remedies should any viola-

lay. If the subject of an inquiry is permitted to remain mute, the Service must resort to other sources to establish the facts, and this usually takes additional time, trouble, and expense. We see no valid reason to impose on the Service this extra burden which confers no corresponding legitimate benefit on the alien or any one else. Delay as an end in itself, whether achieved by obstructionism or dilatory tactic, cannot in our view be a legitimate objective."

tion of Constitutional rights of individuals be established, see *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, Docket No. 75-2019 (January 26, 1977).*

* Finally, with the exception of his "conclusion", the petitioner does not address the issues of voluntary departure. We merely note that the grant or denial of this extraordinary privilege is committed to the broad discretion of the Attorney General or his delegates. *Strantzalis v. Immigration and Naturalization Service*, 465 F.2d 1016 (3d Cir. 1972); *United States ex rel. Bartsch v. Watkins*, 175 F. 2d 254 (2d Cir. 1949). The grant of that privilege is not a matter of right but rather of administrative grace, *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1962). As in other discretionary decisions, the scope of judicial review is extremely narrow and a reviewing court should not substitute its judgment for that of the Attorney General's delegates. See *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.) cert. denied, 423 U.S. 824 (1975); *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966). The proper remedy for *Katris*, should he decide to legally enter this country, is an application for permission to reenter pursuant to Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a) (17) coupled with a valid application for an immigrant visa.

CONCLUSION

The Petition for review should be dismissed.

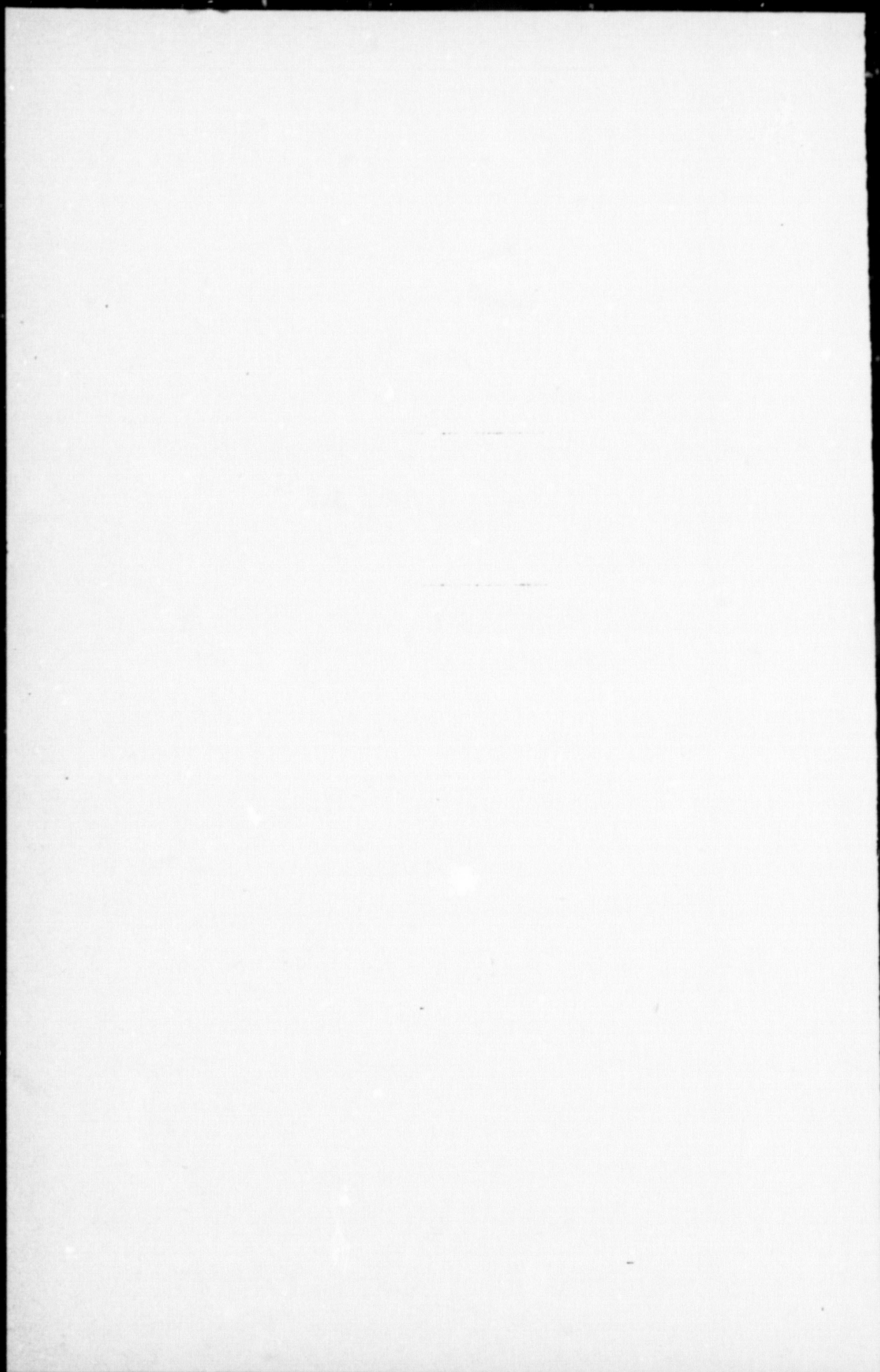
Dated: New York, New York
June, 1977.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

THOMAS H. BELOTE,
ROBERT S. GROBAN, JR.,
Special Assistant United States Attorneys,
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*

ADDENDUM



UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter

—of—

ANGEL DONAY ALVARADO-SANTOS
(A21 055 475),

Respondent.

State of New York)
County of New York) ss.:

PLEASE TAKE NOTICE that the undersigned will move that the Immigration Service arrested, seized and/or without reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and facts upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, seizure and/or search.

The undersigned hereby demands a hearing on a proposed motion to suppress the evidence resulting from the claimed illegal, arrest, seizure and/or search. On the date in question, the undersigned avers that he was seized and arrested by Immigration officers while working in a restaurant and with no probable cause. The Immigration officers failed to elicit sufficient information concerning any illegal status of the respondent in the United States prior to arresting or seizing him. The undersigned moves to suppress all the information resulting from the said illegal arrest because it was elicited under duress and as the result of an illegal arrest with-

out offering the undersigned Miranda warnings as required by the United States Supreme Court.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because respondent wishes to question them as their testimony is relevant and material to the issue of the unreasonable arrest, seizure and/or search which was made without probable cause.

Under the Freedom of Information Act, Sec. 552(b) (7) and such other portions of the Act as may be applicable herein, all notes and memoranda relating to this case and which formed any basis for the detention and seizure of respondent are demanded to be produced or the attorney for respondent be permitted to inspect the same. Also demanded are the names and addresses of any alleged informants relating to the said detention and seizure of the respondent.

(signed) ANGEL DONAY ALVARADO-SANTOS
ANGEL DONAY ALVARADO-SANTOS

Sworn to before me this
1st day of October, 1975

(Signed) DAVID E. OLTARSH
DAVID E. OLTARSH
Notary Public, State of New York
No. 30-8218270
Qualified in Nassau County
Commission Expires March 30, 1976

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No. A21 609 757

In the Matter

—of—

JUAN URLA-MAYEN,

Respondent.

State of New York)
County of New York) ss.:

PLEASE TAKE NOTICE, that the undersigned will move that the Immigration Service arrested, searched and seized the respondent without a warrant and/or without reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and facts upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, search and seizure.

The undersigned hereby demands a hearing on a motion to suppress the evidence resulting from such illegal arrest, search and seizure. On the 6th day of January, 1976 the undersigned avers that he was arrested by Immigration officers at 88 Brook Ave., Deer Park, New York, in the place of business of Vanguard Metals Co., at which time Immigration officers approached him and without asking him any questions placed him under arrest. The Immigration officers failed to elicit any information concerning his nationality or his authorized

presence in the United States before arresting him. The undersigned moves to suppress all the information resulting from the said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because respondent wishes to question them as their testimony is relevant and material to the issue of the unreasonable arrest, search and seizure which was made without probable cause.

Under the Freedom of Information Act, Sec. 552(b) (7) and such other portions of the Act as may be applicable herein, all notes and memoranda relating to this case and which formed any basis for the detention and seizure of respondent are demanded to be produced or the attorney for respondent be permitted to inspect the same. Also demanded are the names and addresses of any alleged informants relating to the said detention and seizure of the respondent.

(Signed) JUAN URLA MAYEN
JUAN URLA MAYEN

Sworn to before me this
23rd day of January, 1976

(Signed) WILLIAM H. OLTARSH
WILLIAM H. OLTARSH
Notary Public, State of New York
No. 60-2961546
Qualified in Westchester County
Commission Expires March 30, 1977

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
File A 21 060 203

In the Matter

—of—

ERNESTO MENDEZ-SANCHEZ,

Respondent.

State of New York)
County of New York) ss.:

PLEASE TAKE NOTICE that the undersigned will move that the Immigration Service arrested, searched and seized the respondent without a warrant and/or without reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and facts upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, search and seizure.

The undersigned hereby demands a hearing on a motion to suppress the evidence resulting from such illegal arrest, search and seizure. On the date in question the undersigned avers that he was arrested by Immigration officers at his home, at which time Immigration officers approached him and without asking him any questions placed him under arrest. The Immigrant officers failed to elicit any information concerning his nationality or his authorized presence in the United States before arresting him. The undersigned moves to suppress all the

information resulting from the said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because respondent wishes to question them as their testimony is relevant and material to the issue of the unreasonable arrest, search and seizure which was made without probable cause.

Under the Freedom of Information Act, Sec. 552(b) (7) and such other portions of the Act as may be applicable herein, all notes and memoranda relating to this case and which formed any basis for the detention and seizure of respondent are demanded to be produced or the attorney for respondent be permitted to inspect the same. Also demanded are the names and addresses of any alleged informants relating to the said detention and seizure of the respondent.

(Signed) ERNESTO MENDEZ-SANCHEZ
ERNESTO MENDEZ-SANCHEZ

Sworn to before me this
2nd day of October, 1975

(Signed) WILLIAM H. OLTARSH
WILLIAM H. OLTARSH
Notary Public, State of New York
No. 60--2961546
Qualified in Westchester County
Commission Expires March 30, 1977

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter

—of—

TSAI FU CHEN

(A. 21 067 600

Respondent.

State of New York)
County of New York) ss.:

PLEASE TAKE NOTICE that the undersigned will move that the Immigration Service arrested, searched and seized the respondent without a warrant and/or reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and fact upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, search and seizure.

The undersigned hereby demands a hearing on a motion to suppress the evidence resulting from such illegal arrest, search and seizure. On the date in question, December 10, 1975, the undersigned he was arrested at about 5 P.M. at the Kegen Restaurant, 80 East 56th Street, New York, N. Y. At the time of the arrest, the respondent, a busboy in said restaurant, was asked by Immigration officers if he had a permanent residence card or a Social Security number. At the time of interrogation, for all practical purposes the alien was incarcerated, because egress from the restaurant was controlled by Immigration officers and every employee in the restaurant knew that their free movements were re-

stricted and that they could then not depart from the restaurant. Respondent was not given any Miranda warnings before being asked questions. The Immigration officers identified themselves prior to the questioning.

They failed to elicit any information concerning respondent's nationality or his authorized presence in the United States before arresting him. The undersigned moves to suppress all the information resulting from said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because respondent wishes to question them as their testimony is relevant and material to the issue of the unreasonable arrest, search and seizure which was made without probable cause.

Under the Freedom of Information Act, Sec. 552(b) (7) and such other portions of the Act as may be applicable herein, all notes and memoranda relating to this case and which formed any basis for the detention and seizure of respondent are demanded to be produced or the attorney for respondent be permitted to inspect the same. Also demanded are the names and addresses of any alleged informants relating to said detention and seizure of the respondent.

(Signed) CHEN, TSAI FU
TSAI FU CHEN

Sworn to before me this
15th day of December, 1975

(Signed) WILLIAM H. OLTARSH
WILLIAM H. OLTARSH

Notary Public, State of New York
No. 60--2961546

Qualified in Westchester County
Commission Expires March 30, 1977

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
15th day of June 1977 she served ~~a copy~~ of the
within Brief for Respondent

by placing the same in a properly postpaid franked envelope addressed:

Oltarsh, Flattery & Oltarsh
225 Broadway
New York, New York 10007

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

15th day of June, 19 77

Pauline P. Troia
PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978